91-155
Nos. 91-555 and 91-339

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

International Society for Krishna Consciousness, Inc., and Brian Rumbaugh,

Petitioners,

v.

Walter Lee, Superintendent of Port Authority Police,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE COUNCIL ON RELIGIOUS FREEDOM, THE FIRST LIBERTY INSTITUTE, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD MCGLYNN GAFFNEY, JR.
VALPARAISO UNIVERSITY
SCHOOL OF LAW
656 South Greenwich Street
Valparaiso, IN 46383
219-465-7834
Counsel of Record

STEVEN T. MCFARLAND
BRADLEY P. JACOB
CENTER FOR LAW & RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane
Suite 222
Annandale, VA 22003
703-642-1070

THOMAS C. BERG
1642 E. 56th Street, #1212
Chicago, IL 60637
312-955-1846
Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether a governmental agency that permits a wide variety of political and commercial speech in airport facilities may single out charitable solicitation for the distribution of religious literature for special regulation without excessively burdening free exercise of religion and the freedom of speech enjoyed by religious communities and their members.

Whether the Court should reaffirm its teaching that the Free Exercise Clause mandates governmental neutrality, not official hostility, toward religion.

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INTERESTS OF AMICI CURIAE

Amici curiae are national religious and educational organizations that defend against constitutional infringement of the first of our civil liberties protected under the First Amendment, religious freedom. Although the *amici* do not espouse or endorse the particular Hindu doctrines or practices of the petitioners, they include among their members many religious adherents who are deeply committed to evangelistic activities. All of the *amici*, irrespective of whether they engage in proselytizing activities themselves, are committed to the proposition that all sincere religious practices are entitled to the equal protection of the laws, and are convinced that the lower court decisions in this case did not live up to this standard. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves." 8 J. Law & Relig. 5, 18 (1990).

This is a case of particular importance to *amici* and other religious organizations because it offers this Court the first opportunity to clarify its teaching in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990) that banning acts only when they are engaged in for religious reasons – in short, religious discrimination – is most strenuously prohibited under the Free Exercise Clause.

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the

parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case involves regulation of speech at three of the airport terminals that serve the New York metropolitan area. An interstate agency, the Port Authority [Port] does not generally prohibit the dissemination of information at these airports. One can purchase a variety of newspapers, periodicals, and books at many of the stores in these facilities. In keeping with the memory of Mayor Fiorello La Guardia and President John Fitzgerald Kennedy – after whom two of the airports are named – one may listen to political speeches by candidates for public office in these facilities, and contribute to their campaigns. One can shop at Bloomingdale's in these facilities, and the Port actively promotes commercial speech in its facilities by dedicating conference space for the use of corporate representatives of the Fortune 500 to engage in business ventures. But after acknowledging in a 1985 deposition that the religious activities of the petitioner were not in any way disruptive of the airport facilities, the Port in 1988 issued a regulation that forms the basis of the present challenge. This regulation may seem neutral in a formal sense, but in the view of the *amici* it plainly takes aim at an unpopular religious group, and is invalid for that reason alone.

In short, the manner in which the Port has chosen to regulate speech is not content-neutral. Instead, the Port has singled out the unpopular speech of a vulnerable

religious minority for disparate treatment, subjecting the devotees of the Hare Krishna faith to regulation that it would never dream of imposing upon President Bush or Governor Clinton when they come to New York to campaign for the Presidency, or upon traveling salespersons coming to the hub of commerce from around the globe to negotiate lucrative business deals. The direct effect of the regulation challenged here is to inhibit the practice of *sankirtan*, an ancient Hindu religious practice that is apparently offensive to some of New York's diverse citizenry. The regulation is thus "specifically directed at [petitioners'] religious practice" and is therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990).

Amici wish to make four related points. First, two of the practices engaged in by the petitioners – distribution of religious literature to nonmembers of their community and begging for alms to support their ministry – are ancient, continuous, well-established, sincere religious practices. Indeed, although there are differences of degree about evangelization and proselytizing among various religious communities, virtually all faiths in America maintain some form of outreach to nonmembers. Second, the court of appeals ignored the teaching of this Court that the Free Exercise Clause requires more than mere formal governmental neutrality toward religion. It requires that religious communities and their members enjoy at least as much protection in their distribution of religious literature as their secular counterparts enjoy in the same forum, however that forum is defined. Third, the purported governmental interest invoked by the court of appeals is insufficient as a matter of law because it

does not justify the differential treatment meted out to those who distribute religious literature in airports out of obedience to religious command and those who use airports for the communication of their political convictions or of their commercial messages. The sole reason cited by the court of appeals to justify the regulation – the convenience of travelers rushing late to their planes – does not satisfy the heavy presumption against prior restraint of speech required by the First Amendment. Here, the Port permits a variety of forms of political and commercial speech at the airport, but has carved out a special exception to prohibit the religious practice of charitable solicitation in support of the distribution of religious literature. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. Agencies of the federal and state governments as well as the lower courts have in many instances misconstrued this Court's teaching in *Smith*. When, as here, agencies of government turn a blind eye toward invidious discrimination against a vulnerable religious minority, it is time for this Court to clarify that *Smith* does not countenance official hostility toward religion.

ARGUMENT

I. PETITIONERS ENGAGE IN ANCIENT AND SINCERE RELIGIOUS PRACTICES THAT ARE PROTECTED UNDER THE FIRST AMENDMENT

Krishna Consciousness is a monotheistic branch of devotional Hinduism, formally known as Gaudiya

Vaishnavism. The Hindu religious tradition dates to approximately 3,000 B.C. *See* Larry Shinn, "International Society for Krishna Consciousness," 7 *Encyclopedia of Religion* 266-68 (Mircea Eliade ed. 1987). The bona fide character of this ancient religion has been affirmed by every court in this country, state and federal, that has explored the matter. *See, e.g., Heffron v. ISKCON*, 452 U.S. 640, 652 (1981); *ISKCON v. Barber*, 650 F. 2d 430, 443 (2d Cir. 1981); *Jaffe v. Alexis*, 659 F. 2d 1018, 1020 (9th Cir. 1981); *United States v. Silberman*, 464 F. Supp. 866, 872 (M.D. Fla. 1979) (citing cases).

A. PROSELYTIZING, OR ATTEMPTING TO PERSUADE OTHERS ABOUT ONE'S RELIGIOUS CONVICTIONS, IS AN ANCIENT RELIGIOUS PRACTICE WITH STRONG ROOTS IN AMERICAN HISTORY

One of the religious practices of the devotees of Krishna Consciousness at issue in this case involves the distribution of religious literature, principally *The Bhagavad-Gita*, a sacred scripture of Hinduism that was formulated around 200 A.D., and that has been called the "New Testament of Hinduism." Edmund Soper ed., *The Religions of Mankind* 10 (1951).[1]

[1] The Bhagavad-Gita was a source of inspiration not only for prominent Indians such as Mahatma Gandhi, but also for the American transcendentalists of the nineteenth century such as Ralph Waldo Emerson and Henry David Thoreau. Walt Whitman and other literary giants of American civilization also cherished the Gita. See Joseph Head and Sylvia Cranston eds., *Reincarnation: The Phoenix Fire Mystery* 227 (1977), and Sylvia Cranston and Carey Williams eds., *Reincarnation* (1984).

This religious practice is, of course, by no means confined to Hindus. For example, the Gospel according to Luke describes the life of Jesus as a journey from the cities and villages of Galilee to the city of Jerusalem in order to "preach and bring the good news of the kingdom of God." (Luke 8:1). The same author, who was the travelling companion of the Apostle Paul on his missionary journeys throughout the Roman Empire, reports that the disciples, in obedience to the direct commission of Jesus himself (Luke 9:1-6; Mt. 28:19-20), "continued without letup teaching and declaring the good news about Jesus as the Christ." (Acts 5:42; 1:8; 20:20).

From the very beginning of the European settlement of this continent, religious communities engaged in strenuous activity to bring the message of Christianity to the natives. For example, the Society for the Propagation of the Gospel in New England was formed in 1649 in response to the efforts of John Eliot to translate the Lord's Prayer and the Ten Commandments into the Algonquin tongue and to preach the Gospel to the natives. *See* Edwin Gaustad, *A Religious History of America* 52 (1966); for a fuller description of the missionary and evangelistic activities not only of the English Puritans, but also of the Spanish, French, and Swedes, *see, e.g.*, Sidney Ahlstrom, *A Religious History of the American People* 103 (1972).

Some religious communities, such as the Jehovah's Witnesses and the Church of Jesus Christ, Latter-Day Saints, are well known for their outreach activities, going door-to-door to share their religious convictions and to distribute religious literature. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court held that although contributions are typically sought by the Witnesses to help

defray the cost of the literature they distribute, that fact did not withdraw the Witnesses' activity from the protection of the Free Exercise Clause, any more than paid advertisements forfeit the protection of the Free Speech and the Free Press Clauses by virtue of their commercial character. *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964). *See also Riley v. Nat. Federation of the Blind*, 487 U.S. 781 (1988) (solicitation of charitable contributions is protected under the First Amendment).

Although not all religious communities in America today engage in the same sort of evangelistic activities, it is fair to say that nearly all religious groups are engaged in some form of outreach to others. In any event, irrespective of whether all such groups engage in proselytizing activities themselves, *amici* are committed to the proposition that all sincere religious practices are entitled to the equal protection of the laws.

B. BEGGING FOR ALMS TO SUPPORT RELIGIOUS MINISTRY IS AN ANCIENT RELIGIOUS PRACTICE WITH STRONG ROOTS IN AMERICAN HISTORY

Another religious practice implicated by the regulation challenged here is known as *sankirtan*, or begging for alms to support the ministry of the religious community, including its distribution of religious literature. This Court has already recognized this practice as a "ritual" within the protection of the First Amendment. *Heffron v. ISKCON*, 452 U.S. 640, 652 (1981).

Once again, Hindus have no monopoly on this religious practice. For example, the duty of care in ancient

Israel for widows, orphans, strangers, and Levites was typically undertaken not by a formal taxation system, but by voluntary offerings collected on behalf of those in need. *See* Johann Gamberoni, "Almsgiving," 1 *Encyclopedia of Biblical Theology* 16-19 (Johannes Bauer ed. 1970) (collecting biblical texts and secondary literature). The early Christian community clearly appropriated this teaching of the Hebrew scriptures, frequently citing Old Testament texts to reflect high esteem for the practice of almsgiving (1 Cor. 11:20-22; 16:15-17; 2 Cor. 8:1-15; 9: 5-15; Luke 16:19-31; Jn. 13:29). Various religious communities throughout the Christian centuries have made the practice of begging on behalf of the poor an essential component of their religious life. *See* L. Boyle, "Mendicant Orders," 9 *New Catholic Encyclopedia* 648-49 (1967).

In today's culture, this form of charitable solicitation may seem strange or foreign to many members of Christian and Jewish faiths who have become upwardly mobile. The very existence of the buildings in which members of mainline religious bodies gather to worship is palpable evidence that, in one sense, their communities are thriving. Indeed, this material "success" may even make some of these religious adherents reluctant to defend a form of charitable solicitation today that seems foreign to their own practices. But this reluctance has more to do with a loss of memory deriving from socio-economic reasons rather than from theological developments within these communities. And in any event, the sensibilities of the majority are no test of religious truth. *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("Freedom of worship . . . may not be submitted to

vote; [it] depends on the outcome of no election"). Members of minority religions have no less right to practice their faith merely because others recoil from it. *Employment Division v. Smith*, 110 S. Ct. 1595, 1599 (1990).

In effect, the Port has prohibited a central religious practice of the Hare Krishna devotees, while exempting a wide variety of secular activities from the strictures of its regulation governing the use of the airport terminal. Begging for almsgiving in public places must be viewed from the only perspective permitted under the First Amendment, that of the religious adherents. Under this view *sankirtan* is utterly vital, an indispensable aspect of their ancient Hindu faith. Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to engage in a religious practice extant among Hindus for nearly 5,000 years, and among Jews, Christians, and Muslims virtually since the founding of these faiths. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 U.S. 1, 71 (1947).

II. RELIGIOUS COMMUNITIES AND THEIR MEMBERS ARE ENTITLED TO AT LEAST AS MUCH PROTECTION IN THE DISTRIBUTION OF RELIGIOUS LITERATURE IN AIRPORTS AS IS ACCORDED TO THE COMMERCIAL AND POLITICAL SPEECH THAT REGULARLY OCCURS IN THESE FACILITIES

The restrictions placed on the distribution of religious literature at the New York and Newark airports by

the Port regulation are not religiously neutral. Although the record in this case does not detail specific instances of overt discrimination, there is a very close fit between the activities prohibited by the regulation and those engaged in by ISKCON devotees, either currently or in the past.[2] On its face, the regulation singles out the very activities for which Krishna devotees are well-known.

There is also an implication that the regulation is readily susceptible of uneven application. The language in the regulation focusing on activity that is "continuous and repetitive," Pet. App. 6, gives to the Port vast discretion to determine what to prohibit. For example, a Port officer might easily look the other way when agents known as "cappers" hawk limousine rides to the City or the suburbs, but come down hard on the Hare Krishnas, and defend the differential treatment by stating that one behavior was "continuous and repetitive" while the other was not. This is the vice of structureless discretion that allows official actors to pursue their personal predilections. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983), citing *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).

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[2] The depositions in this case focused understandably on the legal issues that were then presented, viz., the responsibility of the airlines to allow first amendment activities within the leased areas of the airports. In 1985, Morris Sloane, Deputy Director of the Port Authority, testified that the Port Authority was quite satisfied that the activities of ISKCON devotees were not in any way disruptive of the airport facilities. Sloane Deposition (June 10, 1985), at 75. Until 1988, the Port Authority allowed these activities within the areas of the terminal that were not leased by an airline. JA 63. In that year the airlines were dismissed from the case as a part of a settlement agreement. JA 534.

Thus the primary, if not exclusive, application of the Port's regulation is to the petitioners. As one commentator on *Employment Division v. Smith* has noted, "a law is not neutral if its anti-religious applications are such a major part of the total applications that the anti-religious effect cannot be characterized as 'incidental.'" Douglas Laycock, *The Remnants of Free Exercise* 1990 S.Ct. Rev. 1, 52. Professor Laycock offers an example of a facially neutral ban on the sale of unleavened bread; such a regulation would be invalid not only because the only plausible motive for the regulation is hostility to Jews or to Christians who use unleavened bread in the Eucharist, but also because the anti-religious effect of the regulation would not be incidental since there are virtually no secular uses of unleavened bread. *Id.*; *see also* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

One need not hunt for a smoking gun pointing at folks in shaved heads or saffron robes in order to smell the foul odor of discrimination in this case. Whether transparent or subtle, the discrimination here falls heavily against a less well-heeled group that has to get its support by going into the public square rather than by hosting elegant fund-raising banquets at the Waldorf Astoria.

As the petition for certiorari illustrates, a wide range of political and commercial discourse occurs at airports. Pet. 19. In actual practice, the Port places no restrictions on this sort of communication. Anyone knows that one can buy all the news that's fit to print (and lots more printed material of lesser quality that is no less protected for that fact) within the confines of the New York airport

terminals. Perhaps because of this very fact, the court of appeals acknowledged that the portion of the Port regulation banning distribution of literature violates the First Amendment. Relying on its interpretation of this Court's decision in *United States v. Kokinda*, 497 U.S. ___, 110 S.Ct. 3115 (1990), it affirmed the district court in that respect. Pet. App. 14-15.

Also purporting to rely on *Kokinda*, a case that did not involve any religious activity protected by the Free Exercise Clause, the court of appeals sustained the portion of the Port regulation banning the religious practices of the petitioners with respect to charitable solicitation. Pet. App. 11-14. The functional effect of this reading of the regulation is to impose a burden "specifically directed at [petitioners'] religious practice," a result deemed unconstitutional in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990). Indeed, the Port's regulation cannot be distinguished from an example given by this Court in *Smith*:

> It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. The New York prohibition may be contrasted with the Oregon anti-drug law upheld in *Smith*. The Oregon law applied to everyone, and the Supreme Court held that no

exception was required for the Native American Church. Here, there is no regulation of political and commercial speech at the airport, but a special exception was carved out to prohibit the religious practice of charitable solicitation in support of the distribution of religious literature.

It is no answer to say that there may be some non-religious rituals or ceremonies to which the regulation may apply. It would prove too much if the authority attempted to ban all forms of communication at the airport, including the sales of the *New York Times*, the *Wall Street Journal*, and other periodicals now available in the bookstores at the airports. If the Port had written a regulation that purported to ban all First Amendment activity in the airport terminals, that would constitute the substantial overbreadth condemned in *Bd. of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1988). Indeed, the vice of the Port's regulation is that it is more targeted, having been adopted in apparent response to the specific popular resentment of the petitioners' religious activities at the airports. The net effect is that the Port regulation, even as construed by the court of appeals, imposes a burden on religious practices that is not imposed upon other kinds of speakers.

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990). Indeed, even those scholars who have espoused a narrow

interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority. *See, e.g.*, Walter Berns, *The First Amendment and the Future of American Democracy* (1985), and Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978). Locke wrote: "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses." John Locke, "A Letter Concerning Toleration," in 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952). The regulation here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause, and the view of the founders that religious freedom is "an unalienable right." Declaration of Independence, 1 Stat. 1 (1776).

The regulation presents two constitutional problems. First, it implicitly determines the forms of communication in a public place that are protected and those that are not; it is not content-neutral. Neither is the Port neutral with respect to viewpoints; the Port favors majoritarian religious viewpoints over those of minorities by banning *sankirtan* at its facilities, while maintaining a tri-faith chapel at JFK airport, with Mass available at noon each day, and with other services for Protestant Christians and for Jews. To the Hare Krishna devotees, the practice of *sankirtan* is truly necessary, as necessary to them as the Mass is to a Catholic, or as keeping the Sabbath is to an observant Jew (and probably more necessary – at least to them – than various forms of commercial speech permitted in the airports of New York). In this respect, the

regulation is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. 872, 110 S. Ct. at 1603. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. 872, 110 S. Ct. at 1603. The great City of New York allows the dissemination of all sorts of political and commercial messages on the Eastside, the Westside, and all around the town, but the Port restricts the distribution of religious literature by the Hare Krishna devotees at the City's airports. Having set up a series of traditional and non-traditional public fora, the Port may not refuse to extend these fora to those who wish to use them merely on the ground that the content of their message is religious. *See Bd. of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2378 (1990), (Marshall, J., concurring); and *Widmar v. Vincent*, 454 U.S. 263 (1981).

The second constitutional problem is that the asserted purpose of the regulation – reserving the airport facilities for uses consistent with transportation – admits

of exceptions that inevitably yield discriminatory application. The Port in fact allows various forms of communication at the airport, including political and commercial speech, that are just as unrelated to a strict definition of the use of the terminal exclusively for transportation. The impact of its regulation thus falls squarely and discriminatorily on religious adherents such as the petitioners, who alone are in fact required to refrain from "bothering" travelers with their message. Accordingly, the regulation under challenge is constitutionally flawed by virtue of its grave potential for discriminatory application. Only superficially designed to cope with an issue of commerce and transportation, this regulation has in fact been applied to ban a protected religious practice.

If the Port wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the Port might be forced to reconsider how powerful its interests in this matter are if it had to apply the same rules that it applies to the practices of the petitioners to political speeches or fundraising by Presidential candidates or to the commercial speech and transactions concluded by traveling salespersons of the Fortune 500 meeting in the conference facilities operated by the Port Authority. *See* Laurie McGinley, *Airports Try to Ease the Pain of Waiting with New Ways For Flyers to Spend Money*, Wall St. J. (Aug. 21, 1990) at B1. In any event, the Port may not have two standards for regulation of speech, one allowing socially acceptable forms of speech, and another banning the efforts of an unfamiliar and unpopular minority religion to share its convictions with others. *See McDaniel v. Paty*, 435 U.S. 618, 640 (1978)

(Brennan, J., concurring) ("religious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, and political participation generally"); and *see Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

The line drawn by the court of appeals is oblivious to its implicit religious discrimination. For that reason the judgment below ignored the Court's teaching that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Everson v. Bd. of Education*, 330 U.S. 1, 15 (1947). The very fact that the Port's regulation takes aim so squarely at one religious group makes it difficult to escape the reach of these cases.

The district court reached its decision before this Court's decision in *Smith*; the court of appeals ruled after this Court's decision in *Smith*, but did not comment on that case. *Amici* urge this Court to clarify the implication in *Smith* that religious discrimination should not be countenanced where low-level interests such as that asserted here by the Port – the convenience of travelers – are the only justifications offered to defeat a First Amendment claim.

One of the reasons why this Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not

"water[ed] down" but rather "really means what it says." 494 U.S. 872, 110 S. Ct. at 1605. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.*

In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest. *Amici* deny that the government *ever* could have a compelling interest in forbidding for religious purposes an activity it permits for secular purposes. Certainly no such interest was demonstrated here. As the petition ably shows, there are many secular activities that pose the same imagined "threat" to the government's interest that is posed by petitioners' religious activities. As Judge Oakes suggested in his dissent in the court of appeals, one could be jostled in a crowd gathering to hear a speaker on a sidewalk of New York, but that would not justify silencing the speaker; or one could be surrounded by people milling around in a supermarket, but that would not justify burdens on commercial speech of the sort the Port has imposed here. Pet. App. 25. Unless the Port can justify singling out religion for peculiar burdens (and it has not even tried to do so), the regulation must be struck down.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. 110 S.Ct. at 1599. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose

upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

IV. THIS COURT SHOULD REAFFIRM ITS CONDEMNATION OF OFFICIAL HOSTILITY TO RELIGION

Smith clearly marked a major shift in free exercise doctrine. *See* Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1120-1128 (1990). One of the departures from the established jurisprudence of the Court was the decision to diminish the independent value previously given to the protection of religious freedom. Instead, the Court construed those cases in which it had ruled for a religious claimant as owing to the presence of another constitutional right in addition to religious freedom. Thus, for example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), was rationalized because of the parental liberty interest of the Amish in the education of their own children, 110 S. Ct. at 1601.[3]

This hybridization of the inalienable right of religious freedom causes great difficulty for *amici*. We do not view strict scrutiny of governmental rules affecting religious belief and conduct as a "luxury" we cannot afford, *Smith*, 110 S.Ct. at 1605, but as an "essential element of liberty," *id.* at 1616 (Blackmun, J., dissenting). We do not

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[3] This interpretation of *Yoder* turned that decision into a broad victory for all home schoolers, despite strong internal evidence that the Court intended a far more limited result, 406 U.S. at 215-16.

view religious freedom as a sort of constitutional "Hamburger Helper," but as an independent value that is "the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang." *The Williamsburg Charter*, 8 J. Law & Relig. 5, 8 (1990).

As with any new formulation of doctrine, the view of religious freedom adopted by the Court in *Smith* is one that requires further reflection by this Court. Whether or not the Court wishes to revisit *Smith* at this time, at the very least it ought not to retreat from the view that "religious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, and political participation generally." *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring); *see also Widmar, supra*.

After *Smith*, several governmental agencies have recklessly disregarded the protection that the Constitution affords to religious conscience, belying the promise in *Smith* that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the local level, zoning laws have been invoked both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. *See, e.g., Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, *app. denied*, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990) (post-*Smith* cap on enrollment of students in parochial

school); and *see* R. Gustav Niebuhr, *Here Is The Church*, Wall Street J. (Nov. 20, 1991) at A1. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we even had a regulation purporting to tell the Amish what to wear when they raise a barn. *See, e.g.*, OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites).[4]

The judicial record after *Smith* also betrays a similar insensitivity to religious liberty that may eventually require this Court to reconsider its teaching in *Smith*. For example, in *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring an autopsy was applied to an Orthodox Jew who died in an auto accident, even though this regulation placed a significant burden on a sincerely held religious tenet. This sacrilege was justified by a strikingly unimportant governmental interest (the accuracy of statistics on vehicular accidents), and was manifestly not the least restrictive alternative means of effectuating that low-level governmental interest. In *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990), another district court "regretfully" dismissed on the basis of *Smith* its earlier determination that the government

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[4] This exemption was recently reinstated pending administrative review.

was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of this Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored this Court's suggestions that "it is desirable" for the political branches to provide free exercise exemptions. *See Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

In *Salvation Army v. Dep't of Community Affairs*, 919 F. 2d 183 (3d Cir. 1990), the court decided that *Smith* required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious need to know the identity of the down-and-outers aided by the Salvation Army. Under *Smith*, however, the church must now claim its exemption from the state's reporting requirements – which the court acknowledged would dissuade people in need of help from participating in the church's rehabilitation program – by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order on the second floor of a walk-up because the facility did not have an elevator. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep outside on the street than in a building without an elevator. Under *Smith* analysis, however, the bureaucracy wins, and the nuns and the homeless lose. *See* Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, New York Times (Sept. 17, 1990) at B1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

This political and judicial overkill is akin to the reaction against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), overruled in *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943), including licensing of the Witnesses in order to drive them out of a State, and waves of violent attacks on the Witnesses both by the police and by vigilante mobs. *See, e.g.*, Peter Irons, *The Courage of Their Convictions* 22-23 (1988). This Court

could not have intended all of the far-reaching and outrageous results discussed above, whether in the 1940s or in the 1990s. It may be premature for the Court to undertake a review of its teaching in *Smith*, and *amici* note that the Petitioners do not request the Court to do so in this case. But it is not too early for the Court to correct some profound misunderstandings of what this Court actually said in *Smith*. This case is an apt vehicle for the Court to clarify at once that the *Smith* case did not contemplate a casual attitude among the judiciary about religious discrimination. On the contrary, as suggested in Part III above, the *Smith* court taught more emphatically than before that when a statute or ordinance targets a religious practice for hostile treatment – as the Port regulation does – that result can only be justified by a truly compelling governmental interest *in religious discrimination* and by a showing that the governmental burden placed on religion by the regulation is the least restrictive alternative. No such showing was required or made in the courts below.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15, 1789). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the framers could ever have anticipated 200 years ago.

As the nation celebrates the bicentennial of the Bill of Rights, it is time for this Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did here with such ill-

disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." 8 J. Law & Relig. 5, 8 (1990).

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.
VALPARAISO UNIVERSITY SCHOOL OF LAW
656 South Greenwich Street
Valparaiso, IN 46383
219-464-4233
Counsel of Record

STEVEN T. MCFARLAND
BRADLEY P. JACOB
CENTER FOR LAW AND RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
703-642-1070

THOMAS C. BERG
1642 E. 56th Street, # 1212
Chicago, IL 60637
312-955-1846

Attorneys for Amici Curiae

APPENDIX A

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

Americans United for Separation of Church and State [AU] is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. AU has some fifty thousand individual members of various religious beliefs and some of no religious belief, inclusive of four thousand cooperating religious organizations, with members in all states in the United States, including the State of New York. The organization has been involved in a myriad of cases involving questions of religious liberty, with a number of these reaching the Supreme Court. AU has a vital interest in this case because the issues addressed in this litigation would impact the constitutional freedoms of all religious organizations, not just the Hare Krishna organization.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States, and deals exclusively with issues pertaining to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.,

Inc.; North American Baptist Conference; Progressive North American Baptist Convention, Inc.; Religious Liberty Conference; Seventh Day Baptist General Conference; and Southern Baptists[1] through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to insuring the American people's continued enjoyment of the strong protection afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated

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[1] In addition to its participation in the work of the Baptist Joint Committee, the Southern Baptist Convention now has a special commission, known as the Christian Life Commission, to focus on church-state matters.

the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

Council on Religious Freedom [CRF] is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom. CRF is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries with the full protection of the constitutional guarantees of this nation. CRF speaks to the legal issues raised in this litigation, not because it supports the doctrinal interests of the International Society for Krishna Consciousness but because the loss of freedom for any group represents a loss of freedom for all.

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good

citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins in this brief because it believes that (1) freedom of conscience must include not only the right to believe but also the right to express, advocate, and bear witness to belief; (2) governmental neutrality towards religion is in the best interest of both religion and government, (3) governmental neutrality requires that religious speech be accorded no less protection than other categories of speech.

The National Association of Evangelicals [NAE] was organized in 1942 as a vehicle for united action among evangelical Christians. NAE represents some 43,000 churches from 74 denominations, as well as hundreds of colleges, seminaries, evangelical organizations and thousands of individual members. Through its commissions, affiliates, such as the Evangelical Fellowship of Mission Agencies and National Religious Broadcasters, and through its subsidiary, World Relief Corporation, NAE serves a constituency of more than fifteen million. NAE has frequently testified before Congress and filed many briefs amicus curiae in this Court on matters affecting religious liberty.

The National Council of Churches of Christ in the U.S.A. [NCC] is the cooperative agency of thirty-two Protestant and Eastern Orthodox religious bodies having

an aggregate membership of over 40 million in the United States. It does not purport to speak for all these constituents but for its General Board of some 250 members, made up of the representatives of the member communions in proportion to their size and support of the Council. In furtherance of the policies adopted by the Board over the years supporting religious liberty, the NCC has entered briefs *amicus curiae* in several cases affirming the right of religious groups to disseminate their messages and to solicit support from the public for those messages in places properly opened to the public.